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JAMES H. McKEN

United States Supreme Court

OCTOBER TERM, 1906.

No. 152.

NORTHERN PACIFIC RAILWAY COMPANY, JOHN A. MILLER AND ANNA MILLER, HIS WIFE, AND THE WASHINGTON GRAIN AND MILLING COMPANY,

Plaintiffs in Error,

vs.

JACOB SLAGHT.

BRIEF FOR DEFENDANT IN ERROR.

U. L. ETTINGER,
COUNSEL.

THOMAS NEILL,
W. E. McCROSKEY,
ATTORNEYS.

NORTHERN PACIFIC RAILWAY COMPANY, JOHN A. MILLER AND ANNA MILLER, HIS WIFE, AND THE WASHINGTON GRAIN AND MILLING COMPANY,

Plaintiffs in Error,

vs.

JACOB SLAGHT.

STATEMENT OF CASE.

The facts material to this review may be summarized as follows:

About March 1st, 1883, the defendant in error, and Margaret A. Slaght, his wife, settled upon government lots 10, 11, 14 and 15, section one, over and across which the right of way involved in this case is located, and established their residence thereon with the view of entering the same under the homestead laws of the United States, and continued to reside thereon until after a patent was issued to them for said land. (Transcript, page 127.)

On the 31st day of October, 1887, defendant in error made application to the local land office to file a homestead entry on said land, alleging settlement thereon from March 4th, 1883. (Transcript, page 127.) He could not make a filing before that time because of the fact that the Secretary of the Interior had withdrawn the land from settlement, and had in-

structed the local land officers not to accept filings. (See 2 Land decisions, page 517).

When the filing was tendered, the Northern Pacific R. R. Co. was notified and it contested Slaght's right to file on this land, claiming that it belonged to it, under the grant of 1862, and their selection in 1883. The local land officers decided that the land was not subject to the railroad's selection, but that Slaght was not entitled to it as he was only a tenant of one Powers. (Transcript, 128.)

The Railroad company appealed from that part of the decision adverse to it and Slaght appealed from the decision holding him to be a tenant of Powers, and the Hon. Commissioner decided that the selection by the railroad company was improper and that the company had no right to the land prior to selection, and that when the selection was made that Slaght had settled on the alnd in good faith with the view of taking the land under the homestead laws, and that he was a qualified settler and had continuously resided on the land since March 1st, 1883, and directed that in case his decision should become final that Slaght be permitted to file on the land. (Transcript 37, 128.)

The railroad company appealed to the Secretary of the Interior who affirmed the decision of the Hon. Commissioner, and on April 20, 1897, a patent was issued to defendant in error. (Transcript, page 130-131.)

The Spokane and Palouse R. R. Co. constructed

its road over and across this land in 1886 and fore part of 1887, and filed with the Secretary of the Interior its articles of incorporation and profile which was approved June 27, 1888. (Trans. page 169.)

In August, 1887, the Northern Pacific R. R. Co. sold and conveyed said government lots to one William L. Powers, and on the 14th day of September, 1887, said Powers conveyed to the Spokane and Palouse Ry. Co. a strip across said government lots, two hundred feet wide, for a right of way, which is the same land in controversy in this case. (Trans. page 132.)

On May 12, 1897, the Spokane and Palouse Ry. Co., William L. Powers et al. commenced an action in the Superior Court of the State of Washington, against defendant in error and his wife, to cancel the patent that had been issued to them and to compel a conveyance from them to plaintiffs, alleging that they were the owners in fee of the land through measne conveyance from the Northern Pacific R. R. Co. (Trans. page 133.)

The complaint in that action is set out in full in the reply in this case, and is found in the transcript on pages 29 to 41 inclusive.

Said complaint was verified by an officer of the Spokane and Palouse Ry. Co. and therein it was alleged, in paragraph XI thereof that the Spokane and Palouse Ry. Co. "asserts and claims title to certain portions of the land under and by virtue of certain

instruments in writing duly made and delivered to it by William L. Powers."

A demurrer to that complaint was sustained and the case dismissed and the plaintiffs appealed to the Supreme Court of the State, and from the judgment of said Supreme Court affirming the judgment of the lower court, a writ of error was taken to this court, and on February 23, 1901, this court affirmed the judgment of the state court. (Trans. 133) and in May, 1902, this action was commenced.

(The individuals named as plaintiffs in error are tenants of Northern Pacific Railway Co. and hence we refer to the plaintiffs in error as if the Company was the sole plaintiff in error.)

POINTS AND AUTHORITIES.

The act of March 3, 1875, does not grant to a railroad company a right of way over lands occupied by a settler, without condemnation proceedings.

Railroad Co. vs. Osborn, 160 U.S. 103.
Spokane Falls and N. R. Co. vs. Ziegler, 167 U.S. 69.

The act was in the nature of an offer to any railroad Co. to take effect when accepted.

Railroad Co. vs. Sture, 32 Minn. 95.
Denver & RG. R. Co. vs. Wilson, 62 Pac. Rept. (Col.) 843.

The title under a patent relates back to the date of settlement.

Sec. 4, act of 1880, Supl. Rev. Stat. U.S. 282.
Maddox vs. Burham, 156 U.S. 544.
Nelson vs. N. P. R. Co., 188 U.S. 108.

As against a subsequent claimant on public lands the first in time is the first in right.

Shepley vs. Cowan 91 U.S. 330.
Ard vs. Brandon 156 U.S. 537.

A settler on public lands, before he has made a filing thereon is protected by the act of Congress of 1880.

Nelson vs. N. P. R. R. Co., 188 U.S. 108.

The court will take judicial notice of the rules and orders of the Land Department.

Caha vs. U.S. 152 U.S. 211.
Knight vs. U.S. Land Asst. 142 U.S. 161.

The order of withdrawal of this land, the instructions to local land officers not to accept filings thereon and the order restoring the land to settlement are found in the land decisions.

2 Land Dec. 517.
6 Land Dec. 85 and 131.

The judgment in a former action in which the title to this land was determined is res adjudicata of this case.

24 Ency. of Law (New Ed.) 781 and cases cited.
New Orleans vs. Citizens Bank 167 U.S. 396.
State Exp. vs. Tacoma 13 Wash. 141.
Insensle vs. Auttin 15 Wash. 352.

A judgment on a demurrer to the merits is as much an adjudication as if rendered after trial of facts.

Ally vs. Nott 111 U.S. 472.
Could vs. Railroad Co. 91 U.S. 526.
VanFleet Former Adj. Sec. 306.
24 Ency. Law, (New Ed.) 798.

ARGUMENT.

The questions before this court are:

1. Has the plaintiff in error any right or claim to the right of way in controversy under and by virtue of the Act of Congress of March 3, 1875?

2. If the Spokane and Palouse Ry. Co. the grantor of the plaintiff in error, ever had a right to claim title under the act of 1875, did it lose that right, through an adjudication of title in the case of Powers et al, vs Slaght, wherein the title to this land was determined to be in defendant in error?

The only cases in this Court that we are aware of, where the act of March 3, 1875 was construed as it effected the right of a settler, are the cases of Railroad Co. vs. Osborn 160 U.S. page 103 and Spokane Falls and N. Co. vs. Ziegler 167 U.S. 69.

The only difference between the Osborn case and the one at bar is that Osborn was a settler on unsurveyed land, while the defendant in error was a settler on surveyed land.

Osborn admitted the right of Congress to grant the land, notwithstanding his settlement, but insisted that the act of March 3, 1875, did not grant it to the railroad company, but on the contrary had preserved the rights of settlers by the 3rd section of the act.

This court after quoting the position of Osborn said:

> "It must be conceded that Osborn did not by maintaining possession for several years and putting valuable improvements thereon, preclude the government from dealing with the land as its own and from conferring them on another party by a subsequent grant. On the other hand it would not be easy to suppose that Congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give to them the right to run the lines of their road at pleasure, regardless of the rights of settlers. Accordingly when we examine the act of March 3rd, 1875, upon which plaintiff rests its claim of right to appropriate to its use, without compensation, the land and improvements of Osborn, we find in the 3rd section an express provision saving the rights of settlers in possession."

In the Ziegler case, a filing had been made, but the railroad company made the claim, that is made in the case at bar, viz. "That Ziegler as a mere settler upon public lands of the United States, although with the intention to obtian title to the same, under the pre-emption laws, did not have such vested interest, in the land as would avail against the railroad company, in asserting its right of way conferred by the act of Congress," but this court said:

> "An answer to this question is furnished by the case of Washington & I. R. Co. vs. Osborn 160 U.S. 103 where it was held that a railroad company, whose railroad is laid out so as, under the provisions of the act of March 3, 1875, to cross a part of the public lands, cannot take the part thereof in the actual possession and occupation of a settler who is entitled to claim a pre-

> emption right thereto when the proper time comes, and who has made improvements on the land so occupied by him, without making proper compensation therefor."

This act of 1875 is not a grant *in praesenti* in the same sense as was the grant contained in the act construed in the case of Railroad vs. Baldwin 103 U. S. 426, where the act designated the grantee and contained no conditions, but as said by the Supreme court of Minnesotta in Railroad Co. vs. Sture 32 Minn 95. "This act is in the nature of a general offer to the public, which takes effect and becomes operative as a grant to a particular company only when it accepts its terms by compliance with the conditions precedent in the act itself. This is clearly the theory on which the act is founded. It merely offers or proposes to give any railroad company upon compliance with its terms, the right of way over public lands, to which private rights have not been attached at or before the date of such compliance."

Denver & RG. R. Co. vs. Wilson 62 Pac. 843.

The rights of a railroad company cannot attach until it has manifested its acceptance by complying with the terms of the act or perhaps by the construction of its road. Until then the land is open for settlement, and if settled upon before the company has manifested its acceptance, the settlers' rights must be superior and paramount to that of the company, and under the doctrine of relation, when the settler receives patent, his title relates back to the date of settlement.

See Sec. 4 of act of 1880 Sup. Revised Stat. U. S. page 282.
Maddox vs. Burham 156 U.S. 544.
Nelson vs. N. P. R. R. Co. 188 U.S. 108.

If it were otherwise than this, then a railroad company could claim a right of way over land which had been patented before it accepted the grant under the act of 1875. Under the theory of the plaintiff in error as we understand it, viz: that the grant was *in praesenti* and that the title of the Government was conveyed by the act and remained a floating title until accepted by a company, it must logically follow that if the title passed from the government by the act of 1875 then a subsequent patent to the land would not convey title to a right of way that might be afterwards claimed by a railroad company.

This we submit is a fair deduction from the position taken by the plaintiff in error and shows, we think the absurdity of their position.

The rights of settlers on public lands before they made a filing thereon, was always protected against a subsequent settler, on the doctrine that "the first in time is the first in right."

Shepley vs. Cowan 96 U.S. 330.
Ard vs. Brandon 156 U.S. 537.

But by the act of May 14, 1880, entitled "An act for the relief of settlers on public lands." (Supt. to Revised Stat. 282) the rights of settlers on surveyed and unsurveyed lands prior to filing were confirmed and recognized by Congress.

This court in the case of Nelson vs. N. P. R. R. Co. 188 U.S. 108 said:

> "The third section of this statute is a distinct confirmation of a qualified person who had heretofore settled or should hereafter settle on *any* of the public lands of the United States whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws." * * * "Some who have made comments on this section seem to have overlooked the broad language of section 3 and to forget that that secon embraces not only those who had theretofore but those who might *thereafter* settle on the public lands whether surveyed or unsurveyed." * * * "The meaning we have given to the words, occupied by homestead settler in the act of 1864, and what has been said about the act of 1880, finds support in the decisions of the land department."

In the State Courts the plaintiff in error sought to avoid the effect of this decision by saying that in that case Nelson could not file on the land because it was not surveyed, but that under the act of 1880 where the land was surveyed, the settler had to make his filing within three months, from the time of settlement, and failing to do so he lost his rights as against another, and as this land was surveyed, and Slaght had settled on it in March, 1883, but not having filed on it until October, 1887, he can claim nothing by virtue of his settlement as against the plaintiff in error.

The fact is, however, that Slaght could not file on this land before the middle of October, 1897, and

that he filed on it within fifteen or twenty days after the government gave him the privilege of doing so. That this is true will be seen from an examination of the orders of the Hon. Secretary of the Interior of which this court will take judicial knowledge.

Caha vs. U.S. 152 U.S. 211.
Knight vs. U.S. and Asst. 142 U.S. 161.

When Slaght settled on this land it had been withdrawn from settlement as indemnity land. (Transcript page 36.)

On May 22, 1883, which was about six months before Slaght settled on this land, the Hon. Commissioner of Public lands issued an order to registers and receivers of local land offices within the indemnity belt directing them to refuse applications for land withdrawn for indemnity purposes. (See 2 Land Decisions page 517.)

On August 3, 1887, the Hon. Secretary of the Interior revoked the order of withdrawal of this land, and on September 6, 1887, the Hon. Commissioner issued a circular to registers and receivers to carry out the order of withdrawal, but not to accept filings until after notice of restoration had been published for thirty days.

(See 6 Land decisions pages 85 and 131.)

This circular was dated September 6, and must have required at least five days to reach the local land offices and hence it must have been at least the middle of October before the land was open for fil-

ings, and Slaght made his filings on October 31, 1887.

Hence as said by this court in the Nelson case, supra, "*He could not initiate his right by formal entry of record until the local officers would accept it. He acted with as much promptness as was possible under the circumstances.*"

We now turn to the cases cited by plaintiff in error to see if there is anything therein which is against what the court has said in the cases cited by us.

In support of its claim that the act of 1875 gave it a title, and that Slaght's rights were subject to that title the cases of Noble vs. Union River Logging Co. 147 U.S. 165 and Jamestown & Northern R. Co. vs. Jones 177 U.S. 125, are cited.

In the Noble case the question before the court was the right of the Secretary of the Interior to set aside the act of his predecessor in office. The former secretary had approved the article of incorporation and map of route filed by the Logging Co. under the act of 1875, and Secretary Noble having learned that the Logging Co. was not such a railroad as contemplated by the act, issued a notice to the company to show why the approval of the former secretary should not be revoked and annulled. The question before the court was one of jurisdiction only, and the court said that the functions of the Land Deparmtent ceased when title passed from the government and as the land was public lands, that

the order approving the plat passed the title, and that the department had no further power over it.

It is true that the court stated that the act of 1875 was a grant *in praesenti*, which was true under the facts in that case, as the land was unoccupied, but the rights of a settler was in no way involved in that case. Again said statement was not necessary to a decision of the case and was therefore dictum.

In the Jamestown Northern vs. Jones case, one Sherman Jones filed a pre-emption declaratory statement on February 12, 1881, alleging settlement on February 8, 1881. On May 26, 1882, one King filed his declaratory statement. On February 23, 1883, T. J. Jones settled on the land and filed his declaratory statement, and about the same time Ella Sharp filed a homestead entry thereon. Afterwards T. J. Jones attempted to make final proof under his pre-emption filing, but was refused because of the uncancelled homestead entry of Ella Sharp. Afterward T. J. Jones secured the relinquishment of Sharp's rights, and then filed on the land as a homestead and made final proof. The railroad was constructed *before T. J. Jones ever went on the land*, and the Court held that the construction of the road was evidence and notice of the appropriation, and as Jones had settled on the land, *after the road had been constructed*, his entry was subject to the right of way.

The question before the Court was the right of T. J. Jones in the land, who entered it after the road had been built, as against the railroad. Jones did not

claim any rights as successor in interest to any of the prior settlers, and as the Act of 1875 gave the company a right of way over public lands except as against settlers having possessory rights, when these possessory rights, from any cause, ceased to exist then the land, became free public land, and the right of way attached without conditions.

We can see no parallel in that case to the one at bar. The first claimants having abandoned their claims, then the land became free public land, over which the government had granted a right of way to any railroad which complied with the requirements of the law, and hence any subsequent settler took it subject to this right. In the case at bar respondent continued his residence and cultivation, and by reason thereof secured title, so that the company never secured any rights therein as against him and could only have done so through agreement or condemnation proceedings.

Even if there had been no saving clause in the act of 1875 we submit that the plaintiff in error could not claim any rights to this land because the Spokane and Palouse R. Co. did not *accept* the grant until after the patent had issued to Slaght.

This must be true, because up until February, 1901, when this court decided otherwise, the Spokane and Palouse R. Co. claimed that this land had been granted to the Northern Pacific R. R. Co. under the

grant of 1862, and that it was not public lands in which Slaght could secure any title whatever.

This claim is absolutely inconsistent with the claim that the act of 1875 gave said company a right of way, because if the land had been granted to the N. P. R. R. Co. then it was not public lands and the act of 1875 did not in any way effect it.

Now a grant must have a grantee capable of taking it and who is willing to *accept it*, and while the filing of the articles of incorporation and plat of route is one evidence of an acceptance, yet it is not evidence that the company has accepted the benefits of the act as applied to any particular land, if the conduct and acts of the company show that in fact it did not accept it as to such land. Now it is evident that the Spokane and Palouse railroad did not claim any right under the act of 1875 in September, 1887, when it took a deed from Powers as the grantee of the N. P. R. R. Co. nor had it accepted the grant in May, 1897, when it verified the complaint in the case of Powers vs. Slaght, wherein it alleged that it claimed title under and by virtue of a deed from Powers, and that was after the patent had issued to Slaght.

The fact is that this claim of right under the act of 1875 is an afterthought, brought forward to defeat the rights of defendant in error which he secured after years of litigation in the Land Department and in the State and Federal courts.

ESTOPPEL BY JUDGMENT.

We claim that the plaintiff in error is estopped by the judgment of the state courts and this court in the case of Powers et al vs. Slaght 180 U.S. 173, from claiming a right to this land through any source other than a conveyance from defendant in error or his wife.

The question involved in that case was the ownership of all of government lots 10, 11, 14 and 15, section one over which this right of way is located, and the source of title was only a matter of evidence. The question involved in the case at bar is the ownership of part of said government lots. The plaintiff in error is the grantor of one of the parties to that action and the transfer was made after the adjudication. That judgment adjudicated not only the rights of the parties under the facts set out in the complaint, but also all claims that could have been raised or pleaded in said action.

24 Ency. of Law (New Ed.) page 781 and cases cited.
Isensle vs. Austin, 15 Wash. 352.
State vs. Tacoma, 13 Wash. 141.

The Spokane and Palouse R. Co. was not required to go into that case in order to protect its rights, if the claim of the plaintiff in error in this case is cor-

rect, but having become a party to that action it is bound by the adjudication, and cannot now say that notwithstanding that judgment declaring Slaght to be the owner in fee of all this land, yet it is owner of the fee of part of it.

In considering the question of a former adjudication the question is what was the thing determined in the former action?

New Orleans vs. Citizens Bank 167 U.S. at page 396 and cases there cited.

A decision on a demurrer which goes to the merits has the same force as a judgment after trial.

Ally vs. Nott 111 U.S. 472.
Could vs. Railroad Co. 91 U.S. 526.
VanFleet former Adj. Sec. 306.
24 Ency. of Law (New Ed.) 798.

Before closing we desire to call the attention of the court to the fact that by the judgment of the State court, the plaintiff in error, the N. P. R. R. Co., is given the same right that the act of 1875 gave its grantor, to-wit: the right to bring proceedings to condemn the right of way if it desires to do so, and gives to it the right to occupy 25 feet of right of way where its track, bridges etc. are located without condemnation, so that it has not lost anything nor has it been put to any inconvenience or hardship by the judgment.

We confidently submit that the decision of the State Supreme Court was in keeping with the decisions of this court, and that even if it did err in

those matters specifically passed upon, yet the judgment is correct because the title of the defendant in error was determined in his favor by former adjudications between defendant in error and the grantor of the plaintiff in error.

Respectfully submitted,

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